KEN PAXTON
ATTORNEY GENERAL OF TEXAS

March 3, 2015

Ms. Blair Saylor Oscarsson
Counsel for the Amarillo Economic Development Corporation
Peterson Farris Byrd & Parker
P.O. Box 9620
Amarillo, Texas 79105-9620

OR2015-04123

Dear Ms. Oscarsson:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 555663.

The Amarillo Economic Development Corporation (the "corporation"), which you represent, received two requests from different requestors for all documents supplied by the corporation to federal investigators pursuant to a specified subpoena. We understand you to claim the submitted information does not consist of public information subject to the Act. Further, you claim the submitted information is excepted from disclosure under sections 552.101 and 552.107 of the Government Code.[1] Additionally, you state release of the submitted information may implicate the proprietary interests of McCartt & Associates ("McCartt"); Apex Technical Services, Inc. ("Apex"); Steve Rogers Company ("SRC"); Vitel Communications ("Vitel"); American Elevator Co., Inc. ("American"); Lavin Architects ("Lavin"); and R2M Engineering, L.L.C. ("R2M"). Accordingly, you state, and provide documentation showing, you notified McCartt, Apex, SRC, Vitel, American, Lavin, and R2M of the request for information and of the right of each to submit arguments to this office as to why the submitted information should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

[1]Although you raise Texas Rule of Evidence 503, we note the proper exception to raise when asserting the attorney-client privilege in this instance is section 552.107 of the Government Code. *See* Open Records Decision No. 676 at 1-2 (2002).

Initially, the corporation contends the submitted information consists of information that was "obtained through grand-jury proceedings" that may not be released under the Act. The judiciary is expressly excluded from the requirements of the Act. *See* Gov't Code § 552.003(1)(B); *see also id.* § 552.0035 (access to judicial records is governed by Supreme Court of Texas or other applicable laws or rules). This office has determined a grand jury, for purposes of the Act, is a part of the judiciary and therefore not subject to the Act. *See* Open Records Decision No. 411 (1984). Further, records kept by a governmental body that is acting as an agent for a grand jury are considered records in the constructive possession of the grand jury, and therefore are also not subject to the Act. *See* Open Records Decisions Nos. 513 (1988), 411, 398 (1983). However, the fact that information collected or prepared by another person or entity is submitted to the grand jury does not necessarily mean such information is in the grand jury's constructive possession when the same information is also held in the other person's or entity's own capacity. Such information, when not produced at the direction of the grand jury, may well be protected under one of the Act's specific exceptions to disclosure; but such information is not excluded from the reach of the Act by the judiciary exclusion. *See* ORD 513. In this instance, the corporation states the information at issue was provided by the corporation to an investigator with the Federal Bureau of Investigation (the "FBI") pursuant to a federal grand jury subpoena. Thus, the corporation argues the information "is in the possession of the grand-jury." However, we find the information at issue is also held by the corporation in the corporation's own capacity in the course of official corporation business and, therefore, is subject to the Act. *See* Gov't Code § 552.002 (providing information collected, assembled, or maintained in connection with the transaction of official business by a governmental body is "public information"). Accordingly, we will address the applicability of the Act to the submitted information.

Next, we note the submitted information includes copies of minutes and agendas of public meetings of the corporation. Minutes and agendas of a governmental body's public meetings are specifically made public under the Open Meetings Act, chapter 551 of the Government Code. *See id.* §§ 551.022 (minutes and tape recordings of open meeting are public records and shall be available for public inspection and copying on request to governmental body's chief administrative officer or officer's designee), .043 (notice of meeting of governmental body must be posted in a place readily accessible to general public at least 72 hours before scheduled time of meeting). As a general rule, the exceptions to disclosure found in the Act, such as section 552.107, do not apply to information other statutes make public. *See* Open Records Decision Nos. 623 at 3 (1994), 525 at 3 (1989). Therefore, the corporation may not withhold the submitted minutes and agendas of open meetings under section 552.107 of the Government Code. However, we will consider your argument under section 552.101 of the Government Code against disclosure of the submitted minutes and agendas of public meetings, as well as the remaining information.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Gov't Code § 552.101. This section encompasses information protected by other statutes. You contend the submitted information is excepted from disclosure under section 552.101 in

conjunction with rule 6 of the Federal Rules of Criminal Procedure. Rule 6(e) provides, in pertinent part, the following:

> (2) Secrecy.
>
> > (A) No obligation of secrecy may be imposed on any person except in accordance with Rule (6)(e)(2)(B).
> >
> > (B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:
> >
> > > (i) a grand juror;
> > >
> > > (ii) an interpreter;
> > >
> > > (iii) a court reporter;
> > >
> > > (iv) an operator of a recording device;
> > >
> > > (v) a person who transcribes recorded testimony;
> > >
> > > (vi) an attorney for the government; or
> > >
> > > (vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii).
>
> (3) Exceptions.
>
> > (A) Disclosure of a grand-jury matter–other than the grand jury's deliberations or any grand jury's vote–may be made to:
> >
> > > . . .
> > >
> > > (ii) any government personnel–including those of a state, state subdivision, Indian tribe, or foreign government–that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law[.]
> > >
> > > . . .
>
> (6) Sealed Records. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

FED. R. CRIM. 6(e)(2), (3)(A)(ii), (6). Rule 6(e)(2), in its prescription of secrecy, refers to the previous subsection, which provides "all proceedings must be recorded by a court reporter or by a suitable recording device." *Id.* 6(e)(1). Although you contend the submitted information is confidential pursuant to rule 6 because it was provided to the FBI pursuant to a federal subpoena, you have not shown the corporation or any employee of the corporation received the information as a result of being among the persons subject to the secrecy rule. *See id.* 6(e)(2), (3). Accordingly, we must conclude the submitted information did not come into the possession of the corporation or any of its officials by operation of, or statutory exception to, the secrecy rule. *See id.* Rather, as noted above, the submitted information was created in the ordinary course of the corporation's business. Moreover, section 6(e)(2) states that no obligation of secrecy may be imposed on any person except in accordance with this rule. *See id.* 6(e)(2). Accordingly, we cannot conclude that rule 6 of the Federal Rules of Criminal Procedure makes the submitted information confidential, and the corporation may not withhold any portion of the submitted information under section 552.101 of the Government Code on that basis.

Section 552.101 of the Government Code also encompasses information made confidential by section 551.104 of the Open Meetings Act. Section 551.104 provides, in part, "The certified agenda or recording of a closed meeting is available for public inspection and copying only under a court order issued under Subsection (b)(3)." Gov't Code § 551.104(c). We note the corporation is not required to submit a certified agenda of a closed meeting to this office for review. *See* Open Records Decision No. 495 at 4 (1988) (attorney general lacks authority to review certified agendas or tapes of executive sessions to determine whether governmental body may withhold such information from disclosure under statutory predecessor to section 552.101). Thus, such information cannot be released to a member of the public in response to an open records request. *See* Attorney General Opinion JM-995 at 5-6 (1988) (public disclosure of certified agenda of closed meeting may be accomplished only under procedures provided in Open Meetings Act). Section 551.146 of the Open Meetings Act makes it a criminal offense to disclose a certified agenda or recording of a lawfully closed meeting to a member of the public. *See* Gov't Code § 551.146(a)-(b). The corporation states the requested information includes certified agendas and certified memoranda related to business conducted by the corporation during a closed meeting. Based on this representation, we agree the corporation must withhold the certified agenda of a closed meeting under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code. However, you have failed to demonstrate the memoranda at issue consist of a certified agenda or tape of a closed meeting. Therefore, the corporation may not withhold any of the remaining information under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code.

Section 552.107(1) of the Government Code protects information that comes within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* ORD 676 at 6-7. First, a governmental body must demonstrate the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made "for the purpose of facilitating the

rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and a lawyer representing another party in a pending action and concerning a matter of common interest therein. *See* TEX. R. EVID. 503(b)(1). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.*, meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, orig. proceeding). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You claim the information submitted under Tab C consists of communications between attorneys for the corporation and corporation employees and officials that were made in the furtherance of providing legal services to the corporation, and thus is excepted under section 552.107. Upon review, we agree the communications at issue were encompassed by the attorney-client privilege. However, you inform us the information at issue was disclosed to the FBI investigator pursuant to a federal grand-jury subpoena. Thus, we must determine whether the attorney-client privilege has been waived in the instance. *See In re Monsanto Co.*, 998 S.W.2d 917, 930 (Tex. App.—Waco 1999, orig. proceeding) (finding that disclosure of information to third party waives attorney-client privilege); Open Records Decision Nos. 676 at 10-11 (where document has been voluntarily disclosed to opposing party, attorney-client privilege has generally been waived), 630 at 4 (1994) (governmental body may waive attorney-client privilege under section 552.107(1)), 522 at 4 (1989) (discretionary exceptions in general).

In this instance, you inform us "[i]n the spirit of cooperation," the corporation delivered all of the requested documents to the FBI investigator for production to the federal grand jury. Texas Rule of Evidence 511 states a person waives the discovery privileges if he or she voluntarily discloses the privileged information unless such disclosure itself is privileged.

TEX. R. EVID.511. *See Jordan v. Fourth Supreme Judicial Dist.*, 701 S.W.2d 644, 649 (Tex.1986). In *Axelson, Inc. v. McIlhany*, 798 S.W.2d 550, 554 (Tex. 1990), the court held because privileged information was disclosed to the FBI, the Internal Revenue Service, and the Wall Street Journal, the attorney-client privilege was waived. In this case, you have not demonstrated how the FBI is a privileged party. Further, you do not inform us that the corporation took any steps to resist production in response to the grand jury subpoena, such as by filing a motion to quash. Accordingly, we conclude in providing the requested information to the FBI, the corporation voluntarily waived the attorney-client privilege for purposes of rule 511. *See id.*; *In re Bexar County Criminal Dist. Attorney's Office,* 224 S.W.3d 182 (Tex. 2007) (district attorney waived work product privilege for case file by disclosing file to private litigant pursuant to subpoena duces tecum without objection); *see also S.E.C. v. Brady*, 238 F.R.D. 429 (N.D.Tex. 2006) (attorney-client privilege waived by disclosure of documents to Federal Securities and Exchange Commission; noting Fifth Circuit has not adopted doctrine of selective waiver). Accordingly, the corporation may not withhold any of the information at issue under section 552.107(1) of the Government Code.

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from McCartt, Apex, SRC, Vitel, American, Lavin, or R2M explaining why the information at issue should not be released. Therefore, we have no basis to conclude McCartt, Apex, SRC, Vitel, American, Lavin, or R2M has a protected proprietary interest in the information at issue. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the corporation may not withhold the information at issue on the basis of any proprietary interest McCartt, Apex, SRC, Vitel, American, Lavin, or R2M may have in the information.

The remaining documents also include information that is subject to sections 552.136 and 552.137 of the Government Code.[2] Section 552.136 provides, "Notwithstanding any other provision of [the Act], a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential." Gov't Code § 552.136(b); *see id.* § 552.136(a) (defining "access device"). Accordingly, the corporation must withhold the utility account numbers within the remaining documents under section 552.136 of the Government Code.

Section 552.137 excepts from disclosure "an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body"

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[2]The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, or an e-mail address that a governmental entity maintains for one of its officials or employees. Under section 552.137, a governmental body must withhold the e-mail address of a member of the general public, unless the individual to whom the e-mail address belongs affirmatively consents to its public disclosure. *See id.* § 552.137(b). Because we are unable to discern whether the e-mail addresses within the remaining documents fall within the scope of section 552.137(c), we must rule conditionally. To the extent the e-mail addresses at issue belong to members of the public, the corporation must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See id.* § 552.137(b). However, to the extent the e-mail addresses at issue are excluded by subsection 552.137(c), the e-mail addresses may not be withheld under section 552.137 of the Government Code.

In summary, the corporation must withhold the certified agendas of a closed meeting under section 552.101 of the Government Code in conjunction with section 551.104 of the Government Code. The corporation must withhold the utility account numbers within the remaining documents under section 552.136 of the Government Code. To the extent the e-mail addresses at issue belong to members of the public, the corporation must withhold such e-mail addresses under section 552.137, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. The corporation must release the remaining information.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Claire Morris Sloan
Assistant Attorney General
Open Records Division

CVMS/som

Ref: ID# 555663

Enc. Submitted documents

c: 2 Requestors
(w/o enclosures)

McCartt & Associates
600 South Tyler, Suite 1510
Amarillo, Texas 79101
(w/o enclosures)

Apex Technical Services, Inc.
211 Southeast 17th Street
Amarillo, Texas 79102
(w/o enclosures)

Steve Rogers Company
9220 FM 2590
Amarillo, Texas 79119
(w/o enclosures)

Vitel Communications
200 South Travis Street
Amarillo, Texas 79106
(w/o enclosures)

American Elevator Co., Inc.
1905 South Harvard Avenue
Oklahoma City, Oklahoma 73128
(w/o enclosures)

Lavin Architects
2810 Duniven Circle #100
Amarillo, Texas 79109
(w/o enclosures)

R2M Engineering, L.L.C.
5012 50th Street
Lubbock, Texas 79414
(w/o enclosures)